Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation	)	
Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	

REPLY COMMENTS OF BROADVIEW NETWORKS, INC., CAVALIER TELEPHONE, NUVOX, AND XO COMMUNICATIONS, LLC

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December 22, 2008

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Broadview Networks, Inc., Cavalier Telephone, NuVox, and XO Communications, LLC (hereinafter referred to as "Joint Commenters"), through counsel, hereby provide their reply comments in response to the Order on Remand and Report and Order and Further Notice of Proposed Rulemaking issued by the Federal Communications Commission

("Commission") in the above-captioned proceeding on November 5, 2008[1] and the Order released by the Commission on December 2, 2008.[2]

I. INTRODUCTION AND SUMMARY

The initial comments filed last month highlight that while reform of the current intercarrier compensation regime is needed, the precise nature of the reform and how the reform is implemented are critical. Numerous commenters showed that the reform plan contained in the Chairman's Draft Proposal would have catastrophic consequences for consumers and competition, especially given the current highly problematic economic climate. At the same time, significant support was offered for a measured approach to altering the current intercarrier compensation system. Various parties agreed with the Joint Commenters that the most rational approach is for the Commission to adopt and begin implementation of those specific reforms that are ripe for decision today and to conduct further proceedings during the phase-in period for those initial reforms to determine whether additional changes to the intercarrier compensation system are required.

Commenters voiced considerable agreement that one of the discrete steps the Commission can take now is to require local exchange carriers over time to reduce their intrastate switched access rates to interstate rate levels. Consistent with the Joint Commenters' proposal, numerous commenters suggested an implementation schedule of five years. A five-year implementation schedule would allow carriers to adjust their business plans and, at the same

1 *In the Matter of High Cost Universal Service Support, et al.,* WC Docket No. 05-337, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008).

2 *In the Matter of High Cost Universal Service Support, et al.,* WC Docket No. 05-337, *et al.*, Order, DA 08-2631 (rel. Dec. 2, 2008).

time, reduce the level of any necessary access replacement mechanism that would need to be established.

The initial comments highlighted the lack of record support for adoption of the incremental cost methodology suggested in the Chairman's Draft Proposal. Numerous commenting parties agreed with the conclusions contained in the Declaration of Lee L. Selwyn submitted by the Joint Commenters with their initial comments that the proposed Faulhaber methodology is incomplete, internally inconsistent, and filled with inaccuracies. Those few commenters that favored the Faulhaber methodology over continued use of the TELRIC standard offered no expert analysis of why the Faulhaber approach should be adopted, relying instead on general statements and unsupported conclusions that the proposed standard would move the industry in the right direction. In short, the absence of record evidence that the representations made in the Chairman's Draft Proposal regarding the Faulhaber approach are accurate and in light of the substantial record evidence that the Faulhaber methodology would produce arbitrary, discriminatory, and noncompensatory rates, the Commission should continue use of the TELRIC methodology to set transport and termination rates.

Many commenters also agreed with the Joint Commenters' conclusion that prospectively IP-PSTN traffic should be classified and treated for all purposes as telecommunications. If the Commission elects to classify IP-PSTN traffic as information services going forward (which it should not), however, the Joint Commenters and others strongly support the Commission explicitly affirming that LECs' Sections 251 and 252 rights continue to apply regardless of whether the LEC provides service to a third party VoIP provider or to its own end users when employing IP-enabled CPE. Finally, the Joint Commenters and numerous others urge the Commission to abandon suggestions to revise the current rules governing interconnection architecture. These rules, which have been developed over a decade, are working well and the initial comments provided no reasoned explanation of why they need to be jettisoned to implement intercarrier compensation reform.

II. THERE IS SIGNIFICANT SUPPORT FOR A MEASURED APPROACH TO INTERCARRIER COMPENSATION REFORM

As detailed in our comments, the Joint Commenters support the effort to move forward with comprehensive reform of the current intercarrier compensation system.[3] Intercarrier compensation reform should, however, be carefully targeted, competitively neutral, and phased in over a sufficient period of time to protect competition. The most rational approach is for the Commission to adopt and begin implementation of those specific reforms that are ripe for decision today and to conduct further proceedings during the phase-in period for those initial reforms to determine whether additional changes to the intercarrier compensation system are required and, if so, the form those changes should take.[4]

The overwhelming majority of parties filing comments agree with the Joint Commenters that some degree of reform of the current intercarrier compensation regime is in

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3 *See* Comments of Broadview Networks, Inc., *et al.*, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Broadview, et al. Comments*"), at 2-4.

4 The Joint Commenters stated that the Commission immediately should (1) resolve the Phantom Traffic problem by adopting those portions of the USTelecom solution included in the Chairman's Draft Proposal; (2) curb uneconomic traffic stimulation by adopting the solution the Commission deems most appropriate; and (3) resolve the regulatory treatment of IP-PSTN traffic by treating all IP-PSTN traffic as telecommunications service prospectively. *Broadview, et al. Comments*, at 6-15. If the Commission determines it is appropriate (and lawful) to rationalize intrastate and interstate terminating switched access rates at this time, it should require local exchange carriers ("LECs") to reduce the differential between their interstate and intrastate switched access rates by 20% per year beginning January 1, 2010, so that all switched access traffic is terminated at existing interstate switched access rates at the end of a 5-year transition period. *Id.*, at 36-39. The need for any additional reforms should be addressed in a Further Notice of Proposed Rulemaking ("FNPRM"). *Id.*, at 15.

order.[5] Importantly, many of those commenters also agree that the Commission should adopt a measured approach. They maintain that the Commission should "focus on adopting pragmatic solutions to the most pressing problems associated with intercarrier compensation and universal service"[6] and conduct further proceedings to determine whether additional reforms are necessary.[7] As noted by the Telecom Investors, "[t]he Commission has already been warned that [ ] radical reform proposals threaten to further undermine the already fragile state of investor confidence in the telecom sector."[8]

A. Commenters Agree That Intrastate Switched Access Rates Should Be Reduced To Interstate Levels On A Schedule That Mitigates Harm To Consumers And Competition

There is considerable agreement among commenters that one of the discrete steps the Commission can take now is to require LECs over time to reduce their intrastate switched access rates to interstate access rate levels.[9] Although several commenters endorse the 2-year

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5 *See, e.g.,* Initial Comments of the New York Public Service Commission, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*NYPSC Comments*"), at 2; Comments of the United States Telecom Association, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*USTelecom Comments*"), at 1-2; Comments of CTIA, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*CTIA Comments*"), at 21; Comments of AT&T Inc., WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*AT&T Comments*"), at 1-4.

6 Comments of tw telecom, inc., *et al.*, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*tw telecom Comments*"), at 3-4.

7 *See, e.g.,* Comments of the Independent Telephone & Telecommunications Alliance, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*ITTA Comments*"), at 4 ("ITTA is committed to working with the Commission and industry to achieve meaningful ICC reform that balances impacts among carriers, end-users, and restructuring mechanisms by a fair and measured approach."); Comments of the Telecom Investors, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Investor Comments*"), at 4; Comments of CenturyTel, Inc., WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*CenturyTel Comments*"), at 7.

8 Comments of the Telecom Investors, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Telecom Investor Comments*"), at 2.

9 *See, e.g.,* Comments of Embarq, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Embarq Comments*"), at 24; Comments of Windstream Communications, Inc., WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Windstream Comments*"), at 13; Comments of Sprint Nextel Corporation, WC Docket No. 05-337, *et al.* (filed Nov. 26,

plan contained in the Chairman's Draft Proposal for reducing intrastate switched access rates for terminating traffic to interstate levels, numerous other commenters urge the Commission to adopt a more reasonable implementation schedule.[10] Those commenters present a compelling case that a longer glide path toward unification of intrastate and interstate switched access rates is necessary to protect consumers and reduce the level of any necessary access replacement mechanism ("ARM") that would need to be established.[11] As explained by CenturyTel, a longer implementation schedule "would allow [rural ILECs] to manage their network and other operations over time in order to accommodate the rate change, while maintaining and expanding rural networks to provide modern voice and broadband services."[12] Windstream added that "[i]mposing [ ] sharp and unjustified reductions to intercarrier compensation revenues would make it substantially more difficult for mid-sized carriers to enhance and expand their broadband networks"[13] while a reasonable transition period would "provide stability to broadband providers seeking to construct business plans for further development of their high-speed networks."[14] A transition period of longer than the two years proposed by the Chairman is especially important considering today's global economic market conditions.[15]

2008) ("*Sprint Comments*"), at 3-4; *tw telecom Comments*, at 4; *USTelecom Comments*, at 3.

10 *See, e.g.,* Comments of the Broadband Service Providers, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Broadband Providers Comments*"), at 9; Joint Comments of Citynet, LLC, *et al.*, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Citynet Comments*"), at 9; *ITTA Comments*, at 8; *tw telecom Comments*, at 4; *CenturyTel Comments*, at 7.

11 *See, e.g., CenturyTel Comments*, at 12.

12 *Id.*, at 13.

13 *Windstream Comments*, at 9.

14 *Id.*, at 14.

15 *Broadview, et al. Comments*, at 5.

Level 3 echoed these concerns in an *ex parte* letter filed December 4, 2008 in which it urged the Commission to "spread out" to five years the transition period for bringing intrastate access rates to interstate levels.[16] Level 3 submitted a table illustrating how "front-loaded" the transition under the Chairman's Draft Proposal would be and stated that its five-year transition plan should be adopted instead of the Chairman's approach because it "is more manageable and allows more time for parties to adjust their business plans than do the ... proposals under consideration by the Commission."[17]

Consistent with the Joint Commenters' proposal[18] and the Level 3 plan, numerous commenters suggest an implementation schedule of five years.[19] While some agree with the Joint Commenters that intrastate access rates should be reduced in equal amounts each year over the five year transition period,[20] others – particularly mid-size and rural incumbent local exchange carriers ("ILECs") – call for adoption of a somewhat different structure. Under their approach, a price cap ILEC's intrastate terminating switched access rates would be unified to its CALLS target rate in equal increments over three years by study area.[21] Beginning in year four and continuing through year five, the unified rate would be reduced to the lesser of the current

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16 Letter from William P. Hunt, III, Vice President, Level 3, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-337, *et al.* (filed Dec. 4, 2008) ("*Level 3 Ex Parte*"), at 2.

17 *Id.*

18 *Broadview, et al. Comments*, at 5. The Joint Commenters maintain that the Commission does not have statutory authority to require carriers to reduce their intrastate switched access rates to interstate rate levels but if the Commission nevertheless elects to do so, the Commission should afford affected carriers a reasonable opportunity to reposition their businesses by revising the implementation schedule proposed by Chairman Martin. *Id.*, at 37-38.

19 *See, e.g.,* Comments of the National Telecommunications Cooperative Association, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*NTCA Comments*"), at 3; *ITTA Comments*, at 8; *Windstream Comments*, at 15-16, 23; *CenturyTel Comments*, at 12; *tw telecom Comments*, at 2.

20 *See, e.g., tw telecom Comments*, at 2.

21 *See ITTA Comments*, at 8.

rate or the ILEC's next lower interstate CALLS target rate by study area.[22] Thus, mid-size and rural price cap ILECs would be afforded five years to reduce their intrastate switched access rates, while the largest price cap ILECs would be afforded only three years. The Joint Commenters agree that a five-year transition period is appropriate. The Joint Commenters maintain, however, that a five-year implementation schedule should apply across-the-board to all price cap ILECs, not just mid-size and rural incumbent carriers.

Some commenters suggest that further protections are necessary and urge the Commission to adopt a standstill period of at least two years from the effective date of its order to allow existing agreements to expire and be renegotiated and for the industry to adjust its business plans to a new rate structure.[23] As explained by Citynet:

> most CLECs serving business customers have long-term customer contracts that preclude unilateral retail rate increases. For example, PAETEC's average customer contract length is approximately four years. Second, some state commissions have prevented CLECs from including "change of law" provisions in their customer contracts. Thus CLECs do not have the unfettered freedom suggested by Proposals A and C to increase retail rates to make up for lost intercarrier compensation revenue. Third, some CLECs do not have the ability to offset access reductions with increases in SLCs. Finally, most carriers have already finalized their budgets and business plans for 2009.[24]

Citynet concludes that a two year standstill period is necessary in light of these business realities. The Joint Commenters believe there is merit in adopting a standstill period.

Importantly, each of the commenters proposing a five year transition period for reducing intrastate terminating access rates to interstate levels agree with the Joint Commenters that the Commission should conduct further proceedings during that time to determine what – if

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22 *Id.*

23 *See, e.g., Broadband Providers Comments*, at 9; *Citynet Comments*, at 9.

24 *Citynet Comments*, at 10 (footnotes omitted).

any – additional reform is needed.[25] A number of commenters specify that the Commission should use the further proceeding to "continue to examine the appropriate pricing methodology for establishing the unified intrastate/interstate rate,"[26] and the Joint Commenters endorse that suggestion. While, as discussed below, the Joint Commenters maintain that the TELRIC methodology should be retained, the Joint Commenters agree that the Commission should undertake further analysis to determine whether any modifications to the TELRIC methodology are warranted.[27]

III. THERE IS NO RECORD SUPPORT FOR THE "ADDITIONAL COST" METHODOLOGY CONTAINED IN THE CHAIRMAN'S DRAFT PROPOSAL

The Commission has asked for comment on whether it should continue to employ the TELRIC methodology to set rates for reciprocal compensation traffic under the "additional costs" standard in Section 251(b)(5) of the Act[28] or whether the TELRIC methodology should be replaced by a "new incremental cost methodology."[29] In response, the Joint Commenters, along with several other interested parties, submitted the Declaration of Lee L. Selwyn, which provided detailed analysis of the incremental cost methodology suggested in the Chairman's Draft

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25 *See, e.g., Broadband Providers Comments*, at 10; *Embarq Comments*, at 7; *CenturyTel Comments*, at 13; *tw telecom Comments*, at 2; *Windstream Comments*, at 13.

26 *Broadband Providers Comments*, at 10.

27 Embarq suggests that the Commission employ the Federal-State Joint Board on Universal Service "to determine next steps toward unifying rates for all terminating traffic, evaluating the appropriate cost standard for such traffic, and providing appropriate replacement mechanisms ..." *Embarq Comments*, at 7-8. ITTA suggests that an FNPRM "include a referral to the Federal-State Joint Board on Universal Service to address separations and other relevant matters." *ITTA Comments*, at 9. The Joint Commenters do not oppose referral by the Commission of these matters to a Federal-State Joint Board for recommendations prior to taking further action.

28 47 U.S.C. ¶ 251(b)(5).

29 Chairman's Draft Proposal, at ¶ 267.

Proposal.[30] Dr. Selwyn concluded that the Chairman's proposed additional cost methodology "is arbitrary, discriminatory, will result in noncompensatory prices, is biased in favor of the large RBOCs at the expense of CLECs, and at a minimum is certainly not sufficiently developed for adoption in the type of abbreviated time frame being allowed here."[31]

Numerous commenting parties agreed with these conclusions, finding the proposed methodology to be "results-oriented, incomplete, internally inconsistent, and riddled with inaccuracies."[32] Cincinnati Bell noted that "the Commission appears to have concluded that transport and termination rates based on TELRIC are 'too high' but has not provided a proper basis for this conclusion."[33] And as summarized by Embarq, "[b]y mandating that carriers ignore any [ ] real-world costs of terminating traffic, the Commission would be improperly imposing a requirement to terminate traffic below cost."[34]

Even those commenting parties that did not advocate immediate outright rejection of the Chairman's proposed additional cost methodology identified significant problems with the proposed standard that, at a minimum, warrant further review.[35] As stated by ITTA, "[e]ven at first blush, several compelling characteristics that argue in favor of further investigation, if not ultimate rejection, are apparent."[36] ITTA proceeded to explain that:

> (1) [o]verall, TELRIC has produced reasonable rates ... and the Commission has failed to explain why changes are

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30 Declaration of Lee L. Selwyn, attached to Letter from Brad E. Mutschelknaus, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Selwyn Declaration*").

31 *Id.*, at ¶ 46.

32 *Citynet Comments*, at 19. *See also tw telecom Comments*, at 5-7.

33 Comments of Cincinnati Bell Inc., WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Cincinnati Bell Comments*"), at 10.

34 *Embarq Comments*, at 45.

35 *See, e.g., Windstream Comments*, at 23-26.

36 *ITTA Comments*, at 12.

> needed. (2) The resultant rates from the proposed model do not represent adequately the costs actually incurred by carriers because the assumptions used setting a state-wide network deployment rate do not resemble those used in rural areas ... (3) At bottom, insufficient time has been allocated for review of the model ...[37]

Not surprisingly, those few commenting parties that favor the so-called Faulhaber methodology contained in the Chairman's Draft Proposal offer no expert analysis of why it should be adopted.[38] Instead, they rely on general statements and unsupported conclusions that "the proposed standard will move the industry in the right direction by compelling most carriers to rely primarily on their own end users for recovery of their network costs ..."[39] For example, CTIA contends that the Chairman's additional cost standard is "superior to TELRIC" in part because it excludes joint and common costs that may be appropriate in the UNE context but are not appropriate in the context of transport and termination.[40] CTIA offers the conclusion that joint and common costs should be excluded from the additional cost standard because "terminating carriers would incur all joint and common costs associated with transport and termination even absent that additional traffic"[41] but it offers absolutely no support for this critical conclusion. Similarly, Sprint contends that "the Faulhaber cost standard is more rational from an economic perspective than TELRIC rates"[42] but it fails to produce one shred of evidence to support this blanket statement.

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37 *Id.*, at 12-13.

38 *See, e.g.,* Comments of Comcast Corporation, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Comcast Comments*"), at 6-7.

39 *AT&T Comments*, at 11.

40 *CTIA Comments*, at 25.

41 *Id.*

42 *Sprint Comments*, at 7.

Perhaps in recognition of the myriad shortcomings of the Faulhaber approach, Verizon chose to take a dramatically different tack. Verizon proposed that the Commission refrain from "relying on *any* theoretical cost model to determine the final uniform default terminating rate."[43] Verizon suggested that the Commission instead "rely on market-based agreements to establish a uniform terminating rate cap of $0.0007 per minute or, at a minimum, give states the option of doing so in lieu of conducting cost proceedings."[44] Verizon's preferred approach is a no more economically sound method for establishing terminating intercarrier compensation rates than the Faulhaber methodology, however, and it too should be rejected by the Commission.

Verizon's proposal is predicated on the faulty assumption that $0.0007 per minute is a reasonable approximation of the additional costs of terminating calls. Verizon bases this assumption on the fact that it has entered into agreements with a number of wireline carriers (including AT&T) and CMRS providers that set a rate at or below $0.0007 per minute for terminating traffic.[45] In its view, "carriers would not agree to terminate traffic at rates or below $0.0007 per minute … unless such a rate … provided a 'reasonable approximation of the additional costs' of terminating that traffic."[46] Yet Verizon's conclusion fails to take into account several important market realities.

First, to the extent that the $0.0007 per minute rate is included in an interconnection agreement ("ICA") as part of an overall interconnection deal proves nothing with respect to the market acceptance of this rate in isolation. In the context of a broad negotiation, a

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43 Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Verizon Comments*"), at 48 (emphasis in original).

44 *Id.*, at 42.

45 *Id.*, at 49-50.

46 *Id.*, at 50 (footnote omitted).

party may be willing to agree to be compensated at a below-cost rate for a particular service in return for concessions by its negotiating partner on other important issues. Moreover, due to the overwhelming disparity in market power between Verizon and a CLEC in a typical ICA "negotiation," the resulting agreement is much more likely to resemble a classic contract of adhesion than an arms-length deal between two entities with roughly equal bargaining power. Thus, the CLEC may have no practical choice other than to accept the $0.0007 take-it-or-leave-it rate. Finally, many of the agreements noted by Verizon – particularly those involving CMRS providers – reflect market conditions where traffic flows are in balance or close to in balance. In those situations, the actual rate – whether or not it is cost-based – is of minor consequence to the parties. These circumstances – separately and as a group – demonstrate why it is incorrect to conclude that the existence of agreements containing the $0.0007 rate prove that $0.0007 per minute reflects the additional costs of terminating traffic.

In sum, in the absence of any analysis or record evidence that the representations made in the Chairman's Draft Proposal regarding the Faulhaber approach to setting intercarrier compensation rates are accurate, in light of the substantial record evidence that the Faulhaber methodology would produce arbitrary, discriminatory, and noncompensatory rates,[47] and in light of the inability to conclude that the $0.0007 per minute rate contained in some agreements reflects the additional costs of terminating traffic, the Commission should continue use of the TELRIC methodology to set transport and termination rates.

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47 *See Selwyn Declaration. See also* Declaration of August H. Ankum, Ph.D. and Olesya Denney, Ph.D., QSI Consulting, Inc., on Behalf of PAETEC, CC Docket No. 01-92, *et al.* (filed Nov. 26, 2008).

IV. THE COMMISSION MUST RESIST THE CALL TO REWRITE HISTORY BY REVOKING THE ACCESS CHARGE EXEMPTION FOR VOIP TRAFFIC RETROACTIVELY

Most commenters agree with the Joint Commenters' conclusion that IP-PSTN traffic today qualifies for the access charge exemption extended to enhanced service providers ("ESPs") for more than 20 years. As is noted in the Chairman's Draft Proposal,[48] IP-PSTN traffic entails a net protocol conversion and therefore satisfies a long-standing test for determining whether service providers can elect to connect to the local exchange by purchasing local rather than switched access services. As Sprint states, "the Commission proposes to classify IP-PSTN services as information services because such traffic involves a net protocol conversion between end users. Such a finding would lead to the (appropriate) conclusion that IP-PSTN traffic is not and never has been subject to access charges...."[49] Similarly, Verizon concurs with the conclusion that VoIP services which connect to the PSTN "involve a net protocol conversion between end users, and thus ... constitute 'enhanced' ...services."[50] Verizon acknowledges that there are "certain limited exceptions to the net protocol conversion rule," but agrees that they are "inapplicable in the context of VoIP...."[51] Indeed, Verizon volunteers that there is "abundant support in the record and in the Commission's prior orders explaining that IP-enabled services meet the statutory definition of information services for other reasons, including the fact that the voice calling capabilities of these services are inherently integrated with a host of other features and functions that themselves are information services."[52] The comments make clear that VoIP providers have routed traffic for termination over local reciprocal compensation

48 Chairman's Draft Proposal, at ¶ 209.

49 *Sprint Comments*, at 10.

50 *Verizon Comments*, at 22.

51 *Id.*

52 *Id.*

trunks since their inception, operating on a good faith understanding that the Commission's rules offer them such an access charge exemption.

However, a few ILEC commenters seek to misuse this proceeding – which is intended to reform existing rules to rationalize and unify the intercarrier compensation prospectively – to set the stage for making enormous retroactive access charge claims on VoIP providers by reclassifying IP-PSTN traffic retroactively. This minority asks the Commission to rewrite history and state that VoIP traffic has always been "telecommunications" traffic subject to access charges assessment. Interestingly, however, the proponents of this view offer policy arguments in support of their position rather than any reasoned analysis of past Commission rules, policies, and orders on the topic. NTCA, for example, suggests that access charges must apply because "VoIP is a direct substitute for traditional telephone service," without explaining how such substitutability vitiates the existing net protocol conversion test.[53] Similarly, ITTA describes the need to apply access charges to VoIP traffic as a matter of "equity and regulatory parity," again without explaining how such notions usurp the existing enhances services definition.[54]

Worse yet is the facially inconsistent position of AT&T that all VoIP services are properly classified as "information services" traffic and exempt from all common carrier regulation, but nevertheless are fully subject to access charge assessments that apply exclusively to telecommunications services.[55] AT&T contends that the ESP exemption is available only for receiving inbound calls from customers of the ESP's services, and was "never intended" to apply

53 *NTCA Comments*, at 12.

54 *ITTA Comments*, at 16.

55 *AT&T Comments*, at 24, 29-30.

when ESP services are used for outbound communications.[56] AT&T's contention is belied, however, by the Commission's express determination in 1998 that ESPs may use LEC facilities to both "originate and terminate" traffic without incurring access charge liability.[57] Even more ludicrous is AT&T's suggestion that wholesale carriers that provide termination services for VoIP providers are barred from terminating IP-PSTN traffic over local trunks. The ESP exemption expressly entitles ESPs to order local lines for connection to the PSTN, and LECs that offer PRI and similar local business lines to VoIP providers are simply honoring their legal obligation to provide local connections at business line rates to eligible requesting customers. The Commission must resist the self-serving entreaties of these few ILECs to find years after-the-fact that VoIP providers never qualified for the access charge exemption after all, thereby opening the door to years of enormously disruptive, expensive, and unfair litigation concerning past traffic termination practices.

Of course, the need to avoid retroactive reclassification of VoIP services does not bar the Commission from treating them as telecommunications services from this time forward. The access charge exemption was a temporary exception and can be revoked as it is applied to IP-PSTN services whenever the Commission decides that it no longer makes sense. The Joint Commenters suggested as much in our initial comments, wherein we asked the Commission to both clarify that IP-PSTN services currently qualify for the ESP access charge exemption and revoke the exemption prospectively so that IP-PSTN traffic would be treated as telecommunications traffic for all purposes in the future – including access charge assessment. This formulation has the benefit of not unfairly penalizing service providers for their past

56 *Id.*, at 30.

57 First Report and Order, Access Charge Reform, 12 FCC Rcd 15982 (1998), 16131-32, ¶ 341.

reasonable reliance on the access charge exemption, while eliminating the single largest source of access charge arbitrage going forward. Our plan has the added benefit of preserving rights and obligations under Sections 251 and 252 of the Act including, without limitation, interconnection rights, when carriers provide IP-PSTN services. Thus, VoIP traffic can be folded into the access charge system without undue disruption, provided the Commission makes clear that the revocation of the access charge exemption for IP-PSTN traffic constitutes a "change of law" as suggested by Qwest,[58] and is expressly made "prospective only" as requested by Verizon.[59]

Prospectively, the Joint Commenters agree with other commenters that believe that such interconnected VoIP services should be classified and treated for all purposes as "telecommunications." As CompTel explains, the packet-switching deployed in IP networks and the circuit-switching deployed in TDM networks are simply "alternative transmission technologies used to route traffic," and classifying a voice telephone service as "an 'information service' based solely on the different transmission technologies used to initiate and terminate a telephone call cannot be reconciled with the statutory definitions of information service and telecommunications service...."[60] The Communications Act of 1934, as amended, defines "information services" to exclude information service capabilities employed in the "management, control or operation of a telecommunications system or the management of a telecommunications service."[61] The Commission has recognized that protocol processing should not be used to classify transmission as "information service" when it is employed for the

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58 *Qwest Comments*, at 16.

59 *Verizon Comments*, at 28.

60 Comments of COMPTEL, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*COMPTEL Comments*"), at 11-12.

61 47 U.S.C. §153(20).

"initiation, routing and termination of calls."[62] Thus, as the Commission recognizes, the net protocol conversion test was not intended to permanently reclassify traffic as "information services" where the protocol conversion involves "no change in an existing service, but merely a change in electrical interface characteristics to facilitate transitional introduction of new technology."[63]

As explained in the Chairman's Draft Proposal, the protocol conversion involved in the provision of interconnected VoIP services occurs when a network gateway computer transforms a circuit-switched voice signal into IP packets – or IP packets into a circuit-switched voice signal – and "perform[s] associated signaling, control, and address translation functions."[64] Hence, the Joint Commenters suggest that the Commission now determine that the protocol conversion entailed in providing interconnected VoIP services are used primarily in the "management, control and operation of a telecommunications system or the management of a telecommunications service," and hence *on a going forward basis,* the net protocol conversion occurring the provision of interconnected VoIP services will not alone be sufficient to qualify such interconnected VoIP services as "information services." As explained by tw telecom, this treatment would be consistent with existing Commission practice with respect to other services such as CMRS, where a net protocol conversion occurs without triggering a reclassification of the services from "telecommunications" to "information."[65] Although individual service providers should remain free to demonstrate that their particular service applications qualify as

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62 Chairman's Draft Proposal, at n. 531.

63 *Id.*, at ¶ 210 (citation omitted).

64 *Id.*, at n. 529.

65 *tw telecom Comments*, at 11-13.

enhanced on other bases,[66] interconnected VoIP services would be classified as "telecommunications services" absent any such showing. This treatment would be consistent with the Commission's prior determination that VoIP services are properly viewed as substitutes for traditional telephone services, and not run the risk of jettisoning the entire existing telecommunications framework as traditional telecommunications carriers deploy IP-based equipment to connect to customers.[67]

If the Commission elects to classify IP-PSTN traffic as "information services" going forward (which it should not), however, the Joint Commenters strongly support the suggestion that the Commission "affirm explicitly that LECs' Section 251 and 252 rights continue to apply."[68] The Commission should, of course, reaffirm the holding of its *Time Warner Order*[69] that "the statutory classification of a third-party provider's VoIP service as an information service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Section 251(a) and (b)."[70] But that alone is not sufficient. As Citynet suggests, it also is critical that the Commission go farther and clarify that LECs also retain their rights and obligations under Sections 251(c) and 252, including Sections 251(c)(2) and (3).[71] This is true regardless of whether the LEC provides service to a third party VoIP provider or to its own end users when employing IP-enabled CPE. We strongly

66 *See* Chairman's Draft Proposal, at n. 529; 47 C.F.R. § 64.702(a).

67 *See* Chairman's Draft Order at n. 529, 534; *see also* LNP Order, 22 FCC Rcd at 19547, at ¶ 28.

68 *Citynet Comments*, at 15; *see also* Comments of the National Cable & Telecommunications Association, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*NCTA Comments*"), at 6-7.

69 Time Warner Declaratory Ruling, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007).

70 *Id.*, at ¶ 15.

71 *Id.*, at ¶ 17.

agree with the observation of CityNet that, "[e]ven where the LEC is the provider of information service, some telecommunications must underlie that service if it is going to interconnect with the public network," and in the case of a LEC offering an information service that terminates into the PSTN, "the LEC is providing both an information service and 'telecommunications' that permits the information service to connect to the PSTN."[72] Silence on this important issue would encourage ILECs to deny access to UNE facilities and collocation that are used by CLECs to reach thousands of customers today.[73] The Commission must ratify these arrangements to avoid disruption of existing customer arrangements and to forestall the erection of a barrier to future deployment of IP-based equipment at end user locations.

V. PROPOSALS TO REVISE THE RULES GOVERNING INTERCONNECTION ARCHITECTURE HAVE NO PLACE IN THIS PROCEEDING

The initial comments provided no explanation of why radical changes to the interconnection architecture rules developed over a decade need to be jettisoned to implement reform of the intercarrier compensation system. The initial comments also provided no explanation of how the proposed default interconnection rules contained in the Chairman's Draft Proposal are consistent with statutory rights that enable CLECs to interconnect at "any technically feasible point." It is indeed remarkable that the Chairman's Draft Proposal incorporated the self-serving AT&T/Verizon proposal for a mandated interconnection architecture in its entirety and without change, yet neither AT&T or Verizon attempted to explain or defend their plan in their more than 125 pages of combined comments. One could reasonably conclude that no defense was attempted because none can reasonably be articulated.

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72 *Id.*

73 *See tw telecom Comments*, at 13.

By contrast, COMPTEL and others explained how the Chairman's Draft Proposal would deny CLECs their statutory rights by requiring them to interconnect at the called party service provider's network "edge." The AT&T/Verizon plan would predetermine the point of interconnection on ILEC networks and, as explained by COMPTEL, effectively require competitive carriers to "interconnect directly or indirectly at every location associated with the telephone numbers of the incumbent LEC's customers."[74] These requirements simply cannot be reconciled with statutory language and the long string of Commission precedent that afford CLECs the right to interconnect at any technically feasible point and to request a single point of interconnection in a LATA.[75] Although the Chairman's Draft Proposal asserts that no interconnection rights are abrogated because the plan is set up as a "default" rule, COMPTEL explains how this assertion is untrue. Since the proposal states that the calling service provider is responsible for the transmission and routing of calls to the network edge of the called party "for every call, ... [i]f a competitor and ILEC disagree about where interconnection will take place, the 'default' rules will apply and thereby allow ILECs to dictate the points of interconnection."[76]

The silliness of the entire notion is demonstrated by the fact that the new network interconnection rules would not take effect for 10 years. Clearly, if replacing the existing network interconnection rules was an important precondition to comprehensive intercarrier compensation reform, the changes could not wait for a decade. Beyond that, it is nonsensical to create new rules for interconnection of circuit switched networks when they likely will be replaced in large measure by IP-based interconnection by the time that they are scheduled to take

74 *COMPTEL Comments*, at 21.

75 *Id.*

76 *Id.*, at 22.

effect.[77] As tw telecom observes, the Chairman's Draft Proposal in this regard "is akin to setting standards for whale oil lamps just as the incandescent bulb begins to dominate the lighting market."[78] Thus, the initial comments make clear that the proposed default rules for network edge interconnection should be set aside.

VI. THE COMMISSION SHOULD REJECT OVERLY BROAD PROPOSALS TO CONSTRAIN REVENUE SHARING

Various commenters, including AT&T, Verizon, and Qwest, seek to address concerns about traffic stimulation by proposing that the Commission declare that it is unjust and unreasonable for "any LEC to assess terminating interstate switched access charges on traffic subject to a revenue sharing arrangement."[79] This proposal is both unwarranted and potentially detrimental to the development of local competition. The simple fact is that none of the parties filing comments in the instant dockets or in the traffic stimulation docket[80] has submitted evidence that non-rural CLECs such as the Joint Commenters have engaged or are engaging in traffic stimulation activities or that the rates of non-rural CLECs are unreasonable. Sprint, a proponent of cracking down on traffic stimulators, effectively made this point in August when it revised its original comments to suggest to the Commission that it target traffic stimulation remedies only to rural CLECs and their affiliates.[81] Thus, the Commission has no basis on which to adopt the proposed restriction on revenue sharing arrangements as it would target and may affect those not engaged in traffic stimulation activities.

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77 *See tw telecom Comments*, at 19; *COMPTEL Comments*, at 23.

78 *tw telecom Comments*, at 19.

79 *AT&T Comments*, at 33. *See also* Comments of Verizon and Verizon Wireless, WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Verizon Comments*"), at 68; Comments of qwest Communications International Inc., WC Docket No. 05-337, *et al.* (filed Nov. 26, 2008) ("*Qwest Comments*"), at 13.

80 *Establishing Just and Reasonable Rates for Local Exchange Carriers,* Notice of Proposed Rulemaking, WC Docket No. 07-135 (rel. Oct. 2, 2007).

81 *See Ex Parte* Presentation of Sprint, WC Docket No. 07-135 (filed Aug. 21, 2008).

In addition to lacking any evidence to support adoption, the proposed revenue-sharing restrictions may cause grave harm to the Joint Commenters. Competitive providers enter into a great many innovative, legitimate, and beneficial arrangements with customers, co-carriers, sales agents, and other entities to market services and generate revenue. These arrangements may be jeopardized by the proposed overly-broad revenue-sharing constraint and, even if these arrangements might eventually be found acceptable, the mere existence of the proposed constraint would give AT&T, Verizon, and others another pretext to withhold the payment of access charges to CLECs. This would then engender new rounds of dispute resolution and has the potential to significantly harm CLEC cash flow. For all of these reasons, the Commission should reject the proposed limitation on revenue sharing suggested by some commenting parties.

VII. TRANSIT RATES MUST BE ESTABLISHED USING THE SAME COST STANDARD APPLICABLE TO THE ULTIMATE UNIFORM ACCESS RATE

The Chairman's Draft Proposal errs in simply seeking further comment on whether new rules governing the price of transit services are required. In most areas, transit services are bottleneck services. Competitive wireline carriers, CMRS providers and rural LECs alike have no alternative to the use of ILEC services when transferring traffic to one another in most places. The continuation of high, non-cost based transit charges thus undermines the entire notion of improving network efficiency by moving toward uniform, cost-based terminating intercarrier compensation rates. Accordingly, the Commission should require that transit rates be established through the use of the same cost standard established for setting terminating intercarrier compensation rates, whether TELRIC or otherwise. In addition, as a protective market rule, the Commission should require that transit rates in all cases be set at a price that is lower than the local switching rate charged by the same ILEC in the same geographic area. As

NTCA explains, "[t]he volume of minutes traversing a tandem switch is much higher than that of a local central office switch, therefore it would be reasonable to expect that the cost for providing these services would be lower than the cost of local switching."[82] Requiring transit rates to be subject to the same pricing discipline as other critical elements of intercarrier compensation is essential both to achieving the network efficiency desired by the Commission and to ensuring competitive neutrality in the assessment of intercarrier compensation charges.

VIII. CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Joint Commenters' initial comments, the Commission should adopt intercarrier compensation and universal service reforms that are consistent with the proposals contained herein and in the Joint Commenters' initial comments.

Sincerely,

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December 22, 2008

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[82] *NTCA Comments*, at 38.